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PNSB ACMAR SDN BHD v. PENGARAH TANAH DAN GALIAN SELANGOR & ORS

HIGH COURT MALAYA, SHAH ALAM
SHAHNAZ SULAIMAN J
[JUDICIAL REVIEW NO: BA-25-3-01-2019]
B 12 SEPTEMBER 2024

Abstract – *(i) The doctrine of res judicata prevents the relitigation of issues that have already been ventilated by a competent court in a prior action between the same parties; (ii) Once a court is functus officio and has rendered a final judgment, it lacks the authority to alter or amend it.*

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D ***CIVIL PROCEDURE:*** *Res judicata – Principle – Whether issues had been raised, argued and ventilated before the courts – Whether doctrine of res judicata applicable – Whether court functus officio*

E ***LAND LAW:*** *Acquisition – Compulsory acquisition – Withdrawal of acquisition – Application for judicial review to quash decision of withdrawal – Judicial review and reliefs sought allowed – Application for certificate to be issued pursuant to s. 33 of Government Proceedings Act 1956 against relevant authorities – Matter at High Court stayed pending appeals at Court of Appeal and Federal Court – Whether appropriate to issue s. 33 certificate while appeal pending – Whether award paid pursuant to withdrawal ought to be returned first before issuance of s. 33 certificate – Whether compensation had to be first deducted from amount payable – Whether*

F *authorities barred by doctrine of res judicata – Whether issue had already been raised, argued and ventilated in Court of Appeal and Federal Court – Whether High Court functus officio – Land Acquisition Act 1960*

G The land belonging to the applicant was partially compulsorily acquired for the purpose of a project. Form K, pursuant to the Land Acquisition Act 1960 ('Act'), was never issued and the said acquisition was subsequently withdrawn sometime after the issuance of Form H under the Act ('withdrawal'). This led to the applicant filing for judicial review to quash the decision for the said withdrawal. The judicial review application and the reliefs sought by the applicant were allowed. It was against this backdrop that

H the applicant filed an application for a certificate to be issued, pursuant to s. 33 of the Government Proceedings Act 1956, against the respondents ('s. 33 application') ('encl. 65'). The s. 33 application was filed by the applicant approximately six weeks after the High Court had meted out its decision. In the meantime, the respondents appealed to the Court of Appeal. The s. 33 application was then adjourned, in light of the stay of execution

I granted until the respondents exhausted all avenues of appeal. The Court of Appeal dismissed the first and second respondents' appeal but allowed the third respondent's appeal to the extent that the third respondent bore no liability for the payment of compensation under s. 29 of the Act. There was

no appeal, by the applicant, against the decision of the Court of Appeal. Subsequently, the first and second respondents filed a motion for leave to appeal to the Federal Court, against the decision of the Court of Appeal, which was dismissed; this left the first and second respondents' liability and/or obligation to be final. There was no application, by the applicant, to amend the notice of application for the s. 33 application, to mirror the findings of the Court of Appeal; hence, the third respondent was still named in the s. 33 application. Nonetheless, the applicant deposed an additional affidavit on the final amount to be incorporated into the s. 33 certificate, after taking into account all interests that had been incurred. The first and second respondents argued: (i) that there was an appeal pending, at that point of time, and therefore, it was not appropriate to issue the s. 33 certificate against them. This was prior to the Court of Appeal determination as to the validity of the withdrawal; (ii) that (a) the award paid pursuant to the said withdrawal, in the amount of RM64,056,219 ('Form LC compensation') be returned first by the applicant before the issuance of s. 33 certificate; or (b) the Form LC compensation had to be first deducted from the amount payable to the applicant, *ie*, RM266,972,147 and in consequence the interest thereof be made adjustments accordingly; and (iii) failure to take into account the above would mean the applicant would receive an award, *ie*, the Form LC compensation, in addition to the award given pursuant to the said acquisition, because no such consequential order was made in respect of the Form LC compensation, which was received by the applicant. The applicant submitted that: (i) the first and second respondents were barred from the doctrine of *res judicata* as this issue had already been raised, argued and ventilated in both the Court of Appeal and the Federal Court (on the motion); (ii) once a court had pronounced a final order, the court was *functus officio*.

Held (granting order in terms for applicant's application in encl. 65):

(1) It was not disputed that the Form LC compensation had been released to the applicant and was now in their possession. There was no doubt that the same issue had been raised in the Court of Appeal or the Federal Court. This could be seen from the memorandum of appeal and the motion application. It was also clear that the same issue had been argued before the High Court, Court of Appeal and Federal Court. For these reasons, the doctrine of *res judicata* was applicable. The respondents had prayed for this court to vary the High Court order. However, there was no formal application by the respondents for this court to vary the said High Court order. (paras 24, 26 & 27)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 33(3)
Land Acquisition Act 1960, s. 29

For the appellant - Goik Kenzu, Goik Kenwayne, Christine Ling, Chui Lin & Nik Suhaimi Nik Sulaiman; M/s Goik, Ramesh & Loo
For the 1st & 2nd respondents - Husna Abd Halim; State Legal Advisors, Selangor

Reported by Najib Tamby

JUDGMENT

Shahnaz Sulaiman J:

Introduction

[1] This application in encl. 65 by the applicant is for a certificate to be issued pursuant to s. 33 of the Government Proceedings Act 1956 against the respondents based on the order of the High Court dated 21 August 2020. By the decision of the Court of Appeal on 22 August 2023, the third respondents has no liability for the payment of compensation under s. 29 of the Land Acquisition Act 1960. Therefore, this application for a s. 33 certificate is against the first respondent and second respondent only.

Factual Background

[2] The applicant's land which is located in the District of Klang, Selangor was partially compulsorily acquired ("the said acquisition") for the purpose of Light Rail Transit Line 3 (LRT 3) Bandar Utama to Johan Setia, Jajaran Daerah Klang, Selangor Project (Projek Transit Aliran Ringan Laluan 3 (LRT 3) Bandar Utama ke Johan Setia, Jajaran Daerah Klang, Selangor) ("LRT 3 project").

[3] Form K under the Land Acquisition Act 1960 ("LAA 1960") was never issued, and the said acquisition was subsequently withdrawn sometime after the issuance of Form H under the LAA 1960 ("the said withdrawal"). This led to the applicant filing the application for judicial review to move this court to quash the decision for the said withdrawal ("the JR application").

[4] On 21 August 2020, the High Court allowed the JR application. In relation to the reliefs the applicant sought in their application for judicial review (encl. 1), the then learned High Court Judge allowed the applicant's application for judicial review and the reliefs sought by the applicant.

[5] It is against this backdrop that the applicant filed an application before this court for a certificate to be issued under s. 33 of the Government Proceedings Act 1956 ("the GPA 1956") against all the three respondents ("s. 33 application").

[6] The s. 33 application was filed by the applicant approximately six weeks after the High Court had meted out its decision. In the meantime, the respondents appealed to the Court of Appeal (*vide* case Nos. B-01(A)-451-09/2020 and B-01(A)-470-09/2020). The s. 33 application was then adjourned, in light of the stay of execution granted by this court until the respondents exhausted all avenues of appeal.

[7] The Court of Appeal dismissed the first respondent and second respondents' appeal but allowed the appeal of the third respondent to the extent that the third respondent, to wit, "bore no liability for the payment of compensation under s. 29 ("of the LAA 1960)". There was no appeal against the decision of the Court of Appeal by the applicant.

[8] Subsequently, the first respondent and second respondent filed a motion for leave to appeal to the Federal Court against the Court of Appeal's decision ("the motion"). The motion was dismissed by the Federal Court on 4 January 2024, thus leaving the first respondent and second respondent's liability and/or obligation to be final.

[9] The applicant prayed for the following orders in the s. 33 application as reproduced below:

> 1. Bahawa satu Sijil dikeluarkan kepada Pemohon dibawah Seksyen 33(1) Akta Prosiding Kerajaan 1956 untuk perintah-perintah wajib dan bayaran-bayaran termasuk faedah dan kos oleh RespondenResponden kepada Pemohon di bawah/mengikut Perintah Mahkamah Tinggi Shah Alam bertarikh 21 Ogos 2020 seperti yang berikut:
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> (a) Satu perintah Responden Kedua diwajibkan mengeluarkan dan menghantar serah Borang K kepada Pemohon dan mengambil milikan secara rasmi "take formal possession" Tanah Terjadual tersebut mengikut Akta Pengambilan Tanah 1960 dalam masa Empat Belas (14) hari dari tarikh perintah dan/atau Sijil ini;
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> (b) Responden-Responden membayar kepada Pemohon dan/atau peguamcaranya Tetuan Goik Ramesh & Loo jumlah wang yang diperintahkan termasuk faedah sebanyak RM347,928,259.88 (setakat 29.9.2020) dan kos sebanyak RM10,000.00 kepada Pemohon. Bayaran RM347,928,259.88 harus dibahagikan dan dibayar ke dalam akaun Pemohon sebanyak RM293,707,506.49 (Maybank Akaun No. 512398043117) dan dibayar ke dalam akaun peguamcara Pemohon iaitu Tetuan Goik Ramesh & Loo (Affin Bank Berhad Akaun No: 100340181961) sebanyak RM54,220,753.39 dalam masa 14 hari dari dari tarikh perintah dan/atau Sijil ini;
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> (c) Responden-Responden juga membayar kepada Pemohon dan/atau peguamcaranya Tetuan Goik Ramesh & Loo faedah pada kadar 5% setahun ke atas jumlah RM290,468,321.79 dari 21.8.2020 sehingga penyelesaian penuh.

A 2. Bahawa Responden-Responden dikehendaki untuk mematuhi perintah wajib dan membayar kepada Pemohon dan/atau peguamcaranya Tetuan Goik Ramesh & Loo jumlah-jumlah Perintah Mahkamah Tinggi Shah Alam bertarikh 21 Ogos 2020 yang dinyatakan di perenggan-perenggan 2(f), (g), (h), ((i), (j), (k), 3 dan 4; dan

B 3. Kos;

4. Faedah 5% setahun sehingga penyelesaian penuh; dan

5. Apa-apa relif selanjutnya atau yang lain yang diangggap sesuai dan adil oleh Mahkamah Yang Mulia ini.

C **[10]** There is no application to amend the notice of application for the s. 33 application by the applicant to mirror the findings of the Court of Appeal. Hence the third respondent is still named in the s. 33 application.

[11] Nonetheless, the applicant through its solicitor deposed an additional affidavit on the final amount to be incorporated into the s. 33 certificate after D taking into account all interests that have incurred.

[12] In summary, the High Court order could be divided into three broad parts:

(i) the amount stipulated in Borang H:

E (a) RM266,972,147.00 payable to the applicant and/or its solicitors; and

(b) RM23,496,174.79 payable to the applicant's solicitors for the benefit of the then chargee of the land, Malaysia Building Society Berhad,

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(ii) the late payment charges; and

(iii) the interest of 5% per annum from 21 August 2020 (the date of High Court order) on RM290,468,321.79 and RM12,031,531.17.

G **Principles Relating Issuance of Certificate Under Section 33 Of The GPA 1956**

[13] It is trite that no execution or attachment or process in the nature thereof shall be issued by any court to enforce the payment of any money by the Government.

H **[14]** In this regard, this court alluded to Arifin Zakaria FCJ (as His Lordship then was) in delivering the Federal Court case of *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321 had stated:

I [49] Such an impediment is found in sub-s. (4) of s. 33 ... The sub-section opens with the words "Save as aforesaid" which clearly indicate that any enforcement of money judgment against the Government can only be

> proceeded with in accordance with the provisions as provided earlier. ... In my view the words in the parenthesis in sub-s. (3) and as further fortified by the opening words of sub-s. (4) clearly support the appellant's contention that the ordinary enforcement procedures available as between subjects do not and could not apply to the Government.
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> ...
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> [51] In my opinion the word "save" as used in sub-s. (4) means "except" or "other than". (See *Concise Oxford English Dictionary* 10th edn.) Therefore, "Save as aforesaid" would mean that except or other than as provided in the preceding sub-ss. (1), (2) and (3), no execution etc. shall be issued against the Government for enforcing payment of any judgment sum or costs as stated in the preceding sub-sections.

[15] Once a certificate under se. 33 of the GPA 1956 is issued and served it becomes obligated under sub-s. 33(3) of the GPA 1956 to make the payment (see *Petrojasa* (*supra*), at para. [68]).

Analysis

[16] The first respondent and second respondent in their affidavit in reply (encl. 70) relied on the ground that there is an appeal pending (at that point of time). Therefore, it was argued that it was not appropriate to issue the s. 33 certificate against them. This was prior to the Court of Appeal determination as to the validity of the withdrawal. No further affidavit was filed by the first respondent and second respondent since the motion was rejected by the Federal Court.

[17] The first respondent and second respondent, in their written submissions (encl. 137), put forward the following objections:

(i) that the award paid in pursuant of the said withdrawal, in the amount of RM64,056,219 ("the Form LC compensation") be returned first by the applicant before the issuance of s. 33 certificate; or

(ii) the Form LC compensation have to be first deducted from the amount payable to the applicant, *ie*, RM266,972,147.00 and in consequence the interest thereof pursuant to sub-paras. 2(h), 2(j) and 2(k) from the High Court order be made adjustments accordingly.

[18] It was submitted for and on behalf of the first respondent and second respondent that failure to take into account of the above would mean the applicant be receiving an award, *ie*, the Form LC compensation, in addition to the award given pursuant to the said acquisition, because no such consequential order was made in respect of the Form LC compensation which was received by the applicant.

[19] The applicant in their Additional Written Submission No. 2 (encl. 144) submitted that the first respondent and second respondent are barred from the doctrine of *res judicata* because this issue had already been raised, argued and ventilated in both the Court of Appeal and the Federal Court (on the motion). The applicant reproduced the first respondent and

second respondent's submission before the Court of Appeal as well as the Federal Court. It was further submitted that the Court of Appeal and the Federal Court rejected such argument.

[20] The applicant further submitted that once a court has pronounced a final order, the court is *functus officio* on the following reasons:

(i) the learned High Court Judge who then presided in this court had "no intention" to deduct RM64 million from the order;

(ii) there is no clerical error; and

(iii) the High Court order is clear and no clarification, supplementing of or amendment is required.

[21] This application in encl. 65 was objected to by the first respondent and second respondent on the grounds that an amount of RM64,056,219 (which had been released earlier pursuant to the withdrawal of acquisition), which had been ruled to be invalid by the High Court and affirmed by the Court of Appeal, be returned by the applicant to the first respondent and second respondent prior to the issuance of the s. 33 certificate.

[22] Alternatively, the first respondent and second respondent prayed for the amount of RM64,056,219 be deducted from the principal amount payable under Form H which is RM290,468,321.79 and the necessary calculation of late payment charges on the balance amount after having deducted RM64,056,219 be worked out, before the s. 33 certificate is issued.

[23] The applicant submitted that this cannot be done as the first and second respondents are barred by *res judicata* and the court is *functus officio* for the reason that, the learned High Court Judge who then presided in this court had no intention to deduct RM64,056,219 from the order, and that there is no clerical error on the order. The applicant further submitted that the High Court order dated 21 August 2020 is clear and therefore, no clarification, supplementing of or amendment is required.

[24] It is not disputed that the Form LC Compensation has been released to the applicant and is now in their possession.

Principle Of Res Judicata

[25] In *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, the Supreme Court found that:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicature*. ... The public policy of the law is that it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

> Thus, there are in fact two kinds of estoppel per *rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.
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> ...
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> ... In this respect, we respectfully agree with Peter Gibson J in *Lawdor v. Gray* [1984] 3 All ER 345, 350 who said: "Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action".
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> There is one school of thought that issue estoppel applies only to issues actually decided by the Court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the Court, are still covered by the doctrine of *res judicata ie*, doctrine of estoppel per *rem judicatum*.
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> We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel.
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> (emphasis added)

[26] There is no doubt that the same issue has been raised in the Court of Appeal or the Federal Court. This could be seen from the memorandum of appeal and the motion application. It is also clear that the same issue had been argued before the High Court, Court of Appeal and Federal Court. For this reasons, this court is of the considered view the doctrine of *res judicata* is applicable.

Conclusion

[27] This court has considered the submission on behalf of the respondents which prayed for this court to vary the order dated 21 August 2020. However, this court is unable to find any formal application by the respondents before this court to vary the said High Court order dated 21 August 2020. It follows that this court is unable to consider what is prayed for by the first respondent and second respondent, more so when it is made through the first respondent and second respondent's written submissions. There was no affidavit filed in this respect. For the aforementioned reasons, this court grants an order in terms for the application by the applicant in encl. 65. No order as to cost.